93-70 & 93-108

In the Supreme Court of the United States

OCTOBER TERM, 1993

OREGON WASTE SYSTEMS, INC., AND
GILLIAM COUNTY, OREGON, PETITIONERS

v.

DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE
STATE OF OREGON AND ENVIRONMENTAL QUALITY
COMMISSION OF THE STATE OF OREGON, RESPONDENTS

COLUMBIA RESOURCE COMPANY, L.P., PETITIONER

v.

ENVIRONMENTAL QUALITY COMMISSION
OF THE STATE OF OREGON, RESPONDENT

**On Writ Of Certiorari To
The Supreme Court Of The State of Oregon**

REPLY BRIEF FOR PETITIONERS OREGON WASTE SYSTEMS, INC., AND GILLIAM COUNTY, OREGON

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Oregon strives at great length to explain why the discriminatory fee on disposal of interstate waste should be upheld despite the settled Commerce Clause principles set forth in our opening brief. In the midst of all of the verbiage, however, one argument is notably brief. Even Oregon does not seriously defend the holding of the court below that cost-based fees are exempt from the Commerce Clause's prohibition of discrimination against interstate

commerce (the State devotes less than two of its 37 pages of argument to an equivocal discussion of that topic).

Instead, Oregon tries repeatedly (*e.g.*, Br. 13-16, 26, 39) to revive a contention that the Court squarely rejected less than two years ago — the notion that, because of the particular characteristics of waste disposal transactions and the regulated nature of the waste disposal industry, taxes on waste disposal should be subject to Commerce Clause rules more lenient than those applicable to taxes on other types of commerce. *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009 (1992); see also *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 112 S. Ct. 2019, 2023 (1992); *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978). There simply is no reason for the Court to revisit that question here.

The remainder of Oregon's arguments are squarely at odds with this Court's settled Commerce Clause jurisprudence. Indeed, Oregon seeks nothing less than a revolutionary change in the law that would dramatically increase the States' ability to circumvent the Commerce Clause's prohibition of discrimination against interstate commerce. The Court should reject Oregon's invitation to inject confusion into this area of the law and reaffirm that discriminatory state taxes like the Oregon tax at issue here violate the Commerce Clause.

A. The Oregon Fee Discriminates Against Interstate Commerce.

The linchpin of Oregon's entire position is its repeated contention (see, *e.g.*, Br. 23-24) that the tax does not discriminate against interstate commerce. That assertion is quite remarkable in light of the words of the statute, which expressly single out interstate commerce for a tax not imposed on intrastate commerce. Pet. Br. 5. See *Chemical Waste Management*, 112 S. Ct. at 2014 (statute discriminated

against interstate commerce because tax was "imposed on interstate commerce alone").

In arguing that the tax is not discriminatory, Oregon states (Br. 23-24) that "[t]he appropriate inquiry * * * should consider the entire structure the Oregon legislature has adopted to pay for solid waste management and disposal" and quotes this Court's statement to similar effect in *Maryland* v. *Louisiana*, 451 U.S. 725, 756 (1981). The State asserts that

> Oregon residents support [the state's] solid waste management program through income taxes and by paying, indirectly, the numerous fees imposed on landfill operators and the dumping fee on in-state waste. Out-of-state waste producers pay the additional cost of the state's solid waste management program for disposing of out-of-state waste by paying, also indirectly, the out-of-state disposal fee.

Br. 24 (citations omitted).

The general proposition that a court should consider a State's entire tax structure in determining whether a tax is discriminatory is, of course, well settled. However, as we discussed in our opening brief (at 23), the Court's cases elaborating this "compensatory tax" doctrine — of which *Maryland* is one — establish clear principles for determining whether a tax on interstate commerce is in fact nondiscriminatory because it compensates for an equivalent tax on intrastate commerce. What is peculiar about Oregon's submission is that the State relies on the language of *Maryland* to justify examination of other state tax provisions, but it entirely ignores the standards the Court set in *Maryland* and subsequent cases for determining whether a tax is compensatory.

The Court repeatedly has held, for example, that taxes will qualify as compensatory only if a tax that applies exclusively to intrastate commerce is equal to the tax that

applies to interstate commerce, and the two taxes are triggered by "substantially equivalent event[s]." *Maryland* v. *Louisiana*, 451 U.S. at 759. The paradigmatic example is a sales tax on goods sold within the state and a use tax on goods purchased out-of-state. *Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937). The Court has rejected the compensatory tax argument in every other context in which it has been raised. *Tyler Pipe Industries, Inc.* v. *Washington State Dep't of Revenue*, 483 U.S. 232, 244 (1987); *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 643 (1984); *Maryland* v. *Louisiana*, 451 U.S. at 759; *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 331-332 (1977).

Presumably recognizing that it cannot possibly satisfy the compensatory tax standard (and correctly so (see Pet. Br. 21)), Oregon simply argues that those rules should not apply in this case (see Resp. Br. 40).[1] The question here,

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[1] The States appearing as amici curiae in support of respondents take a different tack, contending (Br. 11-18) that the Oregon tax qualifies as a compensatory tax. But it is clear that disposing of waste within Oregon (which triggers the tax at issue here) and earning income within the State (which triggers the allegedly compensatory tax) are not substantially equivalent events. Indeed, amici recognize that their position requires elimination of the requirement of a "substantially equivalent event." See Br. 17 & n.18.

Amici argue that such a step is justified because all of this Court's decisions refusing to apply the compensatory tax doctrine are inapplicable here. The tax schemes at issue in those cases assertedly led to "inequality" between intrastate commerce and interstate commerce. See Br. 13, 14-16. By contrast, amici assert that "equality *does* exist" here. Br. 14 (emphasis in original). But that assertion assumes the outcome of the compensatory tax inquiry. The critical question is whether the burdens are in fact equal. (As we discuss in the text below, they are not.) The only standards for making that decision are those contained in the Court's compensatory tax cases. Amici would no doubt prefer a different

therefore, is why the Oregon tax should be exempted from the Court's carefully crafted limits on the compensatory tax doctrine.

Oregon has no answer to that question. After all, these standards are not abstract principles. They are practical guidelines for identifying the situations in which a court can conclude with assurance that interstate commerce is not subjected to an economic burden from which intrastate commerce is exempted. Without these guidelines, a court undertaking the discrimination inquiry would be plunged into a classic situation of balancing the proverbial apples and oranges — examining a hodgepodge of taxes imposed on different classes of taxpayers in connection with different events, unable to make any certain determination regarding the relative burdens on interstate and intrastate commerce.

This case illustrates that problem perfectly. In pointing to the state income tax, Oregon ignores the fact that nonresidents who work in Oregon are subject to that tax. See Or. Rev. Stat. § 316.117 (1993). Thus, out-of-state residents who generate waste that is disposed of in Oregon must pay both the Oregon income tax and the tax on disposal of non-Oregon waste. The income tax can hardly compensate for the disposal tax when it is imposed on some of the very people who bear the disposal tax as well.[2]

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approach under which a State's assertion of equal burdens would be sufficient to end the Commerce Clause inquiry, but that would hardly safeguard interstate commerce from discriminatory state action.

[2] The discriminatory nature of the Oregon scheme — including the state income tax — is confirmed by the "internal consistency" test that this Court has used to determine whether state taxes discriminate against interstate commerce. See, *e.g.*, *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987). If all States were to adopt the Oregon system, state residents whose waste

Indeed, this Court has already considered and rejected the very argument advanced by Oregon here. In *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987), Pennsylvania sought to defend its discriminatory levy on trucks engaged in interstate commerce by pointing out that Pennsylvania-registered trucks paid a higher fee if certain other fees and taxes were included. This Court held that the discrimination could not be justified by reference to these other levies: "[i]mplementation of a rule of law that a tax is nondiscriminatory because other taxes of at least the same magnitude are imposed by the taxing State on other taxpayers engaging in different transactions would plunge the Court into the morass of weighing comparative tax burdens." *Id.* at 289 (1987) (internal quotation marks and citation omitted). That conclusion disposes of Oregon's argument here.

Oregon seeks to justify its rather free-wheeling approach by repeatedly invoking (Br. 24-25, 40-42) this Court's decision in *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941 (1982). As the Court recently explained in *Fort Gratiot*, however, the ruling in *Sporhase* rested on the Court's determination that "a confluence of factors could justify a State's efforts to conserve and preserve ground water for its own citizens in times of severe shortage." 112 S. Ct. at 2026 (footnote omitted). *Fort Gratiot* squarely rejected the contention that *Sporhase* grants courts more leeway to uphold discriminatory state laws in the waste disposal context. 112 S. Ct. at 2026-2027; see also page 8, *infra*. The same conclusion is appropriate here.[3]

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is disposed of in-state would pay only the state income tax and (indirectly) the $0.85 per ton disposal fee, while residents whose waste is disposed of out-of-state would pay the state income tax and (indirectly) the $2.25 per ton disposal fee. Interstate commerce plainly would be subject to a greater financial burden.

[3] Indeed, *Sporhase* is even more inapplicable here because this

B. Oregon's Reasons For Exempting The Fee From The *Chemical Waste Management* Test Are Wholly Unpersuasive.

Oregon argues that even if the tax does discriminate against interstate commerce, it should not be analyzed under the constitutional standard that this Court applied to the discriminatory waste disposal tax in *Chemical Waste Management*: when a state law discriminates against interstate commerce, "the burden falls on the State 'to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.'" 112 S. Ct. at 2014 (citation omitted). Again, Oregon's contentions are meritless.

First, as we discussed in our opening brief (at 20-22), Oregon is plainly wrong in arguing (Br. 25-28) that a discriminatory tax should be analyzed under the *Chemical Waste Management* standard only if the plaintiff shows that the tax is motivated by "economic protectionism." This Court has made clear that all discriminatory exactions are subject to that standard. Of course, the purpose underlying the levy remains relevant, but not dispositive: to the extent the State can show that the tax is justified by a legitimate purpose *and* that the purpose cannot be adequately served by

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case involves state taxes, not state regulations. To the extent that the aspect of *Sporhase* relied upon by Oregon has any relevance outside the water rights context (and we believe it does not (see page 8, *infra*)), the decision rests in substantial part on the notion that some leeway is necessary in determining whether regulations are evenhanded; otherwise States would always be required to subject interstate commerce and intrastate commerce to identical regulations. In the state tax context, that leeway already is accorded by this Court in the form of the compensatory tax doctrine.

nondiscriminatory means, the tax may be upheld.[4] General assertions of pure motive cannot circumvent the analysis.

Second, again relying solely on the *Sporhase* decision, Oregon creates (Br. 27-30) several new categories for Commerce Clause analysis — "resource protectionist effect" and "'explicit barriers' to commerce between the States" and concludes that the tax should be upheld because it falls outside those categories. As we have discussed (at 6), nothing in *Sporhase* supports this elaborate new mode of analysis. To the extent the Court even applied a different Commerce Clause principle there, its decision rested on special considerations applicable to water rights that have no bearing on interstate movements of waste. See *Fort Gratiot*, 112 S. Ct. at 2026-2027 & n.6.

Third, Oregon weakly argues (Br. 30) that cost-based fees "do not implicate the kinds of concerns that would merit this [C]ourt's heightened scrutiny." But the State essentially ignores our showing (Pet. Br. 10-17) that this Court's decisions, especially the holding in *Guy* v. *City of Baltimore*, 100 U.S. 434 (1880),[5] and the purposes of the Commerce Clause, preclude the distinction that Oregon seeks to draw.

Instead of addressing the Court's Commerce Clause decisions, Oregon cites two decisions under the Privileges and

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[4] Thus, contrary to Oregon's apparent belief (Br. 43-44), the State bears the burden of demonstrating the *non*protectionist purpose for the tax.

[5] Oregon does mischaracterize the holding in *Guy*, suggesting (Br. 21 n.14) that there was no showing that the wharfage fee was cost based. But the City defended the fees on the ground that they were not "in excess of reasonable compensation for the use of the city's property" (100 U.S. at 441) and this Court held that the level of the fee could not justify the discrimination. That decision rejects the very argument that Oregon advances here.

Immunities Clause that supposedly "suggest" that discriminatory fees are constitutional under that provision. Both of those decisions *invalidated* discriminatory fees, however. And the snippets of dicta that Oregon quotes simply reflect the uncontroversial proposition that discriminatory fees are permissible when the non-resident imposes additional, unique costs upon the State or when residents pay an additional charge under a complementary statutory scheme. Those decisions provide no support at all for Oregon's position here and, in particular, do not justify abandoning the well-settled Commerce Clause principle that discriminatory taxes must be analyzed under the *Chemical Waste Management* test.

Fourth, Oregon suggests (Br. 27-28 & n.16) that the tax's discriminatory economic burden on interstate waste might not be substantial enough to deter disposal of waste in Oregon. Whether or not that is true is legally irrelevant. The additional economic burden on interstate commerce is sufficient to establish unconstitutional discrimination, regardless of whether that burden is sufficient to force consumers to withdraw from interstate transactions. See *Maryland* v. *Louisiana*, 451 U.S. at 760 ("[w]e need not know how unequal the Tax is before concluding that it unconstitutionally discriminates"). Certainly that burden translates into a higher cost for out-of-state enterprises that generate waste, a higher cost that will disadvantage those enterprises in competing with Oregon-based businesses.

Here, moreover, Oregon's own actions demonstrate the substantiality of the burden: as its "fall-back" position in the event the discriminatory fee is held unconstitutional, the Oregon Legislature chose *not* to extend the full $2.25 fee to intrastate commerce, and instead chose to reduce the interstate waste fee to $0.85 per ton, presumably because the $2.25 fee would impose too great a financial burden on Oregon citizens. See Pet. Br. 6 n.5.

Fifth, Oregon asserts (Br. 38) that there is no Commerce Clause issue in this case because Oregon could simply raise the fee on disposal of intrastate waste so that it equals the fee on disposal of interstate waste. But that same fact is present in every Commerce Clause case, and Oregon's submission would therefore vitiate the Commerce Clause. In fact, when they are forced to engage in even-handed taxation, States frequently do not simply raise the levy on intrastate commerce. Oregon's fall-back position is a perfect illustration of that phenomenon. Cf. *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 41-42 (1990) (rejecting State's argument that taxpayer was not entitled to refund of tax violative of Commerce Clause because the State *could have* imposed higher tax rate on intrastate commerce as well as interstate commerce).

C. The Oregon Fee Is Invalid Under The *Chemical Waste Management* Test.

Oregon repeatedly mischaracterizes our position, attributing to us the view that a State may never impose a cost-based disposal fee on interstate waste that is higher than the fee on intrastate waste. See Br. 15, 22. That simply is not true. It is perfectly clear that a State may impose a higher per ton fee *if interstate waste subjects the State to per ton costs greater than intrastate waste*. Absent that justification, this Court's holding in *Chemical Waste Management* — and the long-settled Commerce Clause jurisprudence that case applied — foreclose a discriminatory tax on interstate commerce.

Here, the face of the statute and its implementing regulation make clear that Oregon's discriminatory fee cannot be justified on this basis. The statute requires the fee to be set at a level that recovers all types of costs borne by Oregon and its political subdivisions, including costs that are imposed by intrastate waste as well. By its plain terms, therefore, the

fee cannot be upheld on the ground it is limited to costs unique to interstate waste.[6]

Desperate for some other justification for the discriminatory treatment accorded interstate waste, Oregon asserts (Br. 37) that it is entitled to spread the costs of disposal of Oregon waste among all residents but require generators of interstate waste to pay the full cost of disposing of that waste. The discriminatory tax is supposedly the only way to accomplish that purpose.

We are quite skeptical that the purpose put forward by Oregon's counsel is a legitimate one. If it were, *any* discriminatory user fee could be insulated against Commerce Clause attack through a vague reference to the State's desire to have some of the "costs" supposedly paid for by in-staters through general revenue measures. That would open a large gap in the protection for interstate commerce. As we pointed out in our opening brief (at 15-17), the concept of costs is an elastic one that potentially would allow the States great leeway in imposing large financial burdens on a wide variety of types of interstate commerce.

Moreover, there is no guarantee that state residents will in fact bear the same economic burden as interstate commerce because the State need not actually set aside general funds equivalent to the revenues generated by the discriminatory tax on interstate commerce. Here, for example, Oregon simply asserts that general revenues expended on waste disposal are equal to $1.40 per ton of intrastate waste. That amount of the State's general fund is not dedicated to waste-disposal related costs and, to the extent there is a shortfall in the State's general fund or other priorities intervene, it might not

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[6] The state amici's contention (Br. 7-10) that the statute and regulation cannot be held invalid on their face is incorrect. The very terms of the statutory mandate *require* that the fee be calculated in a manner that is certain to be unconstitutional.

be expended at all. Allowing States to invoke this "cost-spreading" rationale to justify discriminatory exactions could reduce Commerce Clause analysis to little more than a fiscal shell game in which a State pointed to various slices of its general fund to justify various discriminatory fees without regard to whether the general fund monies ever actually would be expended.

It also is most unlikely that Oregon's professed purpose had anything to do with the adoption of the discriminatory tax. Under the *Chemical Waste Management* standard, Oregon bears the burden of demonstrating that this was in fact the State's purpose. In view of the large number of state measures that have been held unconstitutional on the ground that they impose unjustified discriminatory burdens on interstate waste (see NSWMA Am. Br. 6-7 & n.4), it would be remarkable if Oregon chose the same discriminatory path in order to accomplish an entirely different purpose.[7]

The Court need not rest its decision on either of these grounds, however. To the extent that the proffered purpose is legitimate and is in fact the rationale underlying Oregon's statute, there is a nondiscriminatory means of accomplishing it. Oregon could impose an even-handed tax and at the same time pay a subsidy to persons who dispose of intrastate waste, with the subsidy financed out of general revenues produced by taxes on all Oregon residents. That would produce a less discriminatory (indeed, nondiscriminatory) tax and allow Oregon to spread among all of its residents the costs associated with disposal of intrastate waste. Thus, even assuming Oregon is correct in arguing that its cost-spreading

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[7] Indeed, as we discussed in our opening brief (at 26-31), the record makes clear that Oregon was motivated by protectionist purposes.

purpose is legitimate and actually underlies the discriminatory tax, the present fee nonetheless violates the Commerce Clause.[8]

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[8] The state amici assert (Br. 12-13) that a rule permitting Oregon to follow this course, but forbidding the discriminatory tax challenged in this case, would elevate form over substance. But the Court has observed that "[t]he Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, *but only action of that description in connection with the State's regulation of interstate commerce.*" *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269, 279 (1988) (emphasis in original). Thus, in *New Energy Co.*, the Court held unconstitutional Ohio's discriminatory tax credit for use of ethanol (which was not available for use of certain non-Ohio ethanol), while noting that the Indiana company challenging the Ohio measure was "the potential beneficiary of a scheme no less discriminatory than the one it attacks, and no less effective in conferring a commercial advantage over out-of-state competitors": a direct cash subsidy for in-state ethanol producers. *Ibid.* The fact that the discriminatory tax's economic effect was similar to that of a subsidy program arguably permissible under the Commerce Clause provided no reason for leaving Ohio's discriminatory tax in place. *Ibid.*

Moreover, requiring the fee for intrastate waste to be set at the same level as the fee for interstate waste would have the practical effect of reducing significantly the inherent political pressure to discriminate against interstate commerce. See Pet. Br. 16-17. Because the same fee would be paid by in-staters (at least in the first instance), the political system would be much more likely to operate to set the fee at an appropriate level.

That result is especially likely under the Oregon scheme. The receipts from the discriminatory fee are dedicated — they may be expended only for programs related to waste disposal. By contrast, only the $0.85 fee on intrastate waste is similarly dedicated. As we have discussed, the $1.40 per ton that Oregon contends is expended on these purposes from the general fund is never isolated and in fact may never even be spent. If Oregon enacted an even-handed disposal fee, all of those receipts would be dedicated for waste

Oregon complains (Br. 36-37) that it will have to restructure its tax system if the discriminatory tax is held unconstitutional. But the State plainly was aware of the possibility that the discriminatory fee might be invalid under the Commerce Clause. That is why the Legislature took the unusual step of including the "fall-back" tax in the statute.

More fundamentally, the very purpose of the Commerce Clause is to limit to some degree the tax systems available to the States. Whenever a state tax is struck down under the Constitution, the State's choice has been restricted, but that is the necessary consequence of all constitutional limits on state authority.

D. The Oregon Courts' Limited Scope Of Review Is Irrelevant To The Disposition Of This Case.

As it did at the certiorari stage, Oregon seeks to hide behind the state courts' limited scope of review, asserting that petitioners chose this forum in order to "hamstring" the State (Br. 14) and that the statute should be upheld because the State allegedly is disabled from advancing its arguments.

To begin with, as discussed in detail in our reply brief at the petition stage (at 5-6 n.4), we selected this judicial review option because it appeared to provide the most expeditious route for resolution of the numerous state and federal challenges to the discriminatory tax. Oregon has no basis whatever for its intimation that petitioners acted in bad faith.

The unconstitutionality of the tax is clear from the arguments presented above and on pages 10-26 of our opening brief. Those arguments do not stray beyond the state courts' scope of review. They rest solely upon the face of

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disposal-related costs. The fact that Oregon could no longer reallocate the $1.40 to other general government purposes in the event the fee were set too high would provide a strong incentive to set the even-handed fee at an appropriate level.

the statute and rule and related provisions of Oregon law. For that reason, this Court can and should hold the tax unconstitutional.[9]

Oregon's arguments, by contrast, *do* rest upon the record. For example, Oregon's sole support for its fundamental contention — that the tax is nondiscriminatory because it is balanced by general revenue measures imposed on Oregon residents — consists of citations to the rulemaking record. See Resp. Br. 24 (citing R. 592, 593, 671). Thus, it is clear the Court cannot uphold the tax under the limited scope of review. See also Pet. Br. 26-27 n.11.

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[9] Our record-based arguments (Pet. Br. 26-30) simply provide additional support for that conclusion. Oregon has not cited any authority establishing that this Court lacks the power to consider the facts set forth in the rulemaking record, which is part of the lower court record in this case. The Court need not consider the record-based arguments, however, because the statute is unconstitutional on its face. (To the extent those claims cannot be asserted in this proceeding, petititioners obviously retain their right to press them in other appropriate proceedings.)

CONCLUSION

The judgment of the Supreme Court of the State of Oregon should be reversed.

Respectfully submitted.

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